

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DAVE-RANDALL PASQUINO,
a/k/a DAVE RANDALL and ANTHONY DAVE-
RANDAI PASQUINO,

Defendant-Appellant.

UNPUBLISHED

July 26, 2002

No. 230374

Kent Circuit Court

LC No. 99-006151-FH

Before: Murray, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree criminal sexual conduct, MCL 750.520c(1)(b), and fourth-degree criminal sexual conduct, MCL 750.520e(1)(g). Defendant was sentenced to two years and six months to fifteen years' imprisonment for the second-degree criminal sexual conduct conviction and eight to twenty-four months' imprisonment for the fourth-degree criminal sexual conduct conviction. We affirm.

Defendant first argues that he was denied the effective assistance of counsel when his trial counsel failed to verify that the witness list was filed, which defendant claims resulted in his inability to present numerous key witnesses to testify as to his good character and relationship with the complainant. We disagree. Because defendant's motion to remand based on ineffective assistance of counsel was denied by this Court,¹ our review of this issue is limited to errors apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d

¹ *People v Pasquino*, unpublished order of the Court of Appeals, entered September 19, 2001 (Docket No. 230374).

123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Nor will it assess counsel’s competence with the benefit of hindsight. *Id.* at 445.

Based on the existing record in this case, defendant has failed to overcome the presumption that his trial counsel’s conduct was sound trial strategy. Furthermore, failure to call witnesses constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). However, defendant was not deprived of a substantial defense and has failed to establish that he was prejudiced by trial counsel’s failure to verify the filing of the witness list and present certain witnesses. We are not persuaded that the testimony of defendant’s proposed witnesses² would have affected the outcome of the trial, and therefore, defendant was not prejudiced by the failure to present such witnesses. *Noble, supra*. Accordingly, defendant was not denied the effective assistance of counsel.

Defendant next argues that the trial court abused its discretion in admitting evidence regarding defendant’s viewing of Internet websites containing teenage pornography under MRE 404(b). We disagree. We review the trial court’s decision to admit evidence for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000). In this case, defendant was charged with having criminal sexual contact with his fifteen-year-old adopted daughter. Defendant gave a general denial of some of the allegations, but denied touching the complainant for a sexual purpose in regard to other described acts. The trial court granted the prosecution’s motion to introduce evidence of defendant’s Internet “visits” to teenage pornographic websites under MRE 404(b) as proof of defendant’s intent to touch the complainant for a sexual purpose.

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

² It appears that several of defendant’s proposed witnesses would testify to defendant’s good character, including defendant’s strong support of the complainant’s academic career and as an advocate of equal opportunities for female students based on intelligence and abilities, and not because of physical attributes, and his positive relationship with the complainant.

MRE 404(b) is a rule of inclusion and other acts evidence is admissible “*whenever* it is relevant on a noncharacter theory.” *People v Vandervliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994) (emphasis in the original). Whether other acts evidence is admissible involves an examination under the following “four-pronged test:” (1) the evidence must be offered for a proper purpose other than propensity, (2) the evidence must be relevant, (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403, and (4) the trial court may, upon request, provide a limiting instruction. *Id.* at 73-75.

In this case, the prosecution offered the evidence of defendant’s teenage pornographic Internet activity to show defendant’s intent in touching the complainant for a sexual purpose. “[A] plea of not guilty puts the prosecution to its proofs regarding all elements of the crime[s] charged. Thus, a tactical general denial by a defendant does not prevent the prosecutor from introducing other acts evidence at trial” as defendant suggests in this case. *Id.* at 78. Second-degree and fourth-degree criminal sexual conduct requires proof that the defendant engaged in sexual contact with the complainant. MCL 750.520c(1); MCL 750.520e(1). “Sexual contact” is statutorily defined as the intentional touching of the victim’s intimate parts or of the clothing covering the immediate area of the victim’s intimate parts, if that touching “can reasonably be construed as being for the purpose of sexual arousal or gratification.” *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997), quoting MCL 750.520a(k). The other acts evidence in this case was relevant to and probative of defendant’s intentional touching of the complainant, and that this touching could “reasonably be construed as being for the purpose of sexual arousal or gratification.” See *id.*; *Vandervliet*, *supra* at 76. Further, we find the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, and agree with the prosecution that any possibility of unfair prejudice was minimized by the admission of only the names of the teenage pornographic websites without the content and the trial court’s limiting instruction. Accordingly, the trial court did not abuse its discretion in admitting the other acts evidence under MRE 404(b).

Affirmed.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Kirsten Frank Kelly